

This Opinion is Not a
Precedent of the TTAB

Mailed: March 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

Nutravita limited

v.

Jenny Do

—
Cancellation No. 92073305
—

Janice Housey and Clifford D. Hyra of Fresh IP PLC
for Nutravita limited.

Marin Cionca of Cionca IP Law, P.C.
for Jenny Do.

—
Before Adlin, Larkin and Lebow,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Respondent Jenny Do owns a registration for NUTRIVITA, in standard characters, for “dietary and nutritional supplements” in International Class 5 (the “Registration”).¹ Petitioner Nutrivita limited seeks to cancel the Registration, alleging that it is a United Kingdom “dietary supplements company,” and that it owns an application to register the mark shown below

¹ Registration No. 5584153, issued October 16, 2018.



for dietary and nutritional supplements in International Class 5.² Petitioner further alleges that its pleaded application was refused under Section 2(d) of the Trademark Act based on a likelihood of confusion with the mark in Respondent's Registration. 1 TTABVUE 3-4 (Notice of Opposition ¶¶ 3, 5, 6).³ As grounds for cancellation, Petitioner alleges that: (1) "Respondent has not used Respondent's Mark in commerce on any of the goods identified in Respondent's Registration including not having used Respondent's Mark on the identified goods at the time of filing its [use-based] application;" and, alternatively, (2) "Respondent is not currently using Respondent's Mark on the goods identified in Respondent's Registration and has abandoned Respondent's Mark without intent to resume." *Id.* at 4 (Notice of Opposition ¶¶ 7, 8).⁴

In her amended answer, Respondent admits that Petitioner's pleaded application "appears to have been refused" based on her Registration, but otherwise denies the

² Application Serial No. 88383347, filed April 12, 2019 under Trademark Act Sections 1(b), based on an intent to use the mark in commerce, and 44(e), based on a United Kingdom registration.

³ Citations are to TTABVUE, the Board's online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

⁴ In its Trial Brief, Petitioner argues that Respondent does not own the mark in the involved Registration. 16 TTABVUE 19-21. Because Petitioner did not plead non-ownership as a ground for cancellation, we have given this argument no consideration. *Demon Int'l LC v. Lynch*, 86 USPQ2d 1058, 1060 n.5 (TTAB 2008) ("To the extent opposer intended this allegation in its brief as a claim that applicant's mark is not entitled to registration in the absence of a disclaimer, we have not considered it because such matter was not pleaded in the notice of opposition.").

salient allegations in the petition for cancellation. Respondent also asserts affirmative defenses, but failed to submit evidence or argument about them at trial, thus waiving them. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

I. The Record and Its Probative Value

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Respondent's Registration. In addition, Petitioner introduced a notice of reliance on Internet printouts, official records and Respondent's discovery responses, 14 TTABVUE ("Pet. NOR"), and Respondent introduced a notice of reliance on Internet printouts and official records. 15 TTABVUE ("Resp. NOR"). Neither party introduced testimony.⁵

Decisions to forego testimony and rely instead on notices of reliance alone often prove fateful, perhaps especially in nonuse/abandonment and other types of fact-intensive cases. This is such a case.

The general problem with relying solely on Internet printouts and other types of evidence that are admissible through notice of reliance alone is that these types of materials generally are not competent to establish the truth of the matters asserted therein. To the contrary, we consider unexplained, unauthenticated documents submitted through notice of reliance alone, such as webpages and printed

⁵ We have not considered the exhibits attached to Respondent's Trial Brief. We have only considered evidence timely submitted during the parties' trial periods. *Hole in 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020 at *2 (TTAB 2020).

publications, only for what they show on their face. *See Safer Inc. v. OMS Inv. Inc.*, 94 USPQ2d 1031, 1039-40 (TTAB 2010) (webpages “have little probative value. They are admissible only to show what has been printed, not the truth of what has been printed.”); *Research in Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1929 (TTAB 2009) (“although the printed publications are deemed of record, they merit consideration ... only for what the documents show on their face”); *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007). *See also TV Azteca, S.A.B. de C.V v. Martin*, 128 USPQ2d 1786, 1790-91 (TTAB 2018); *WeaponX Performance Prods. Ltd. v. X Motosports, Inc.* 126 USPQ2d 1034, 1041-42 (TTAB 2018). Petitioner is well aware of these limitations, as it makes clear in its Trial Brief. 16 TTABVUE 15-16.

The more specific problem with notice of reliance evidence in nonuse and abandonment cases is that plaintiffs often bear the burden of proving a negative – that the defendant was not using her mark or did not intend to resume its use. It is unlikely that documents admissible only for what they show on their face could establish either of these often crucial elements of nonuse/abandonment claims.

TV Azteca amply illustrates the problem. There, in support of its abandonment claim, the petitioner relied “on official records in an attempt to show that Pennant East closed in 2011.” *TV Azteca*, 128 USPQ2d at 1791. Those official records showed that what appeared to be a Pennant East liquor license lapsed twice and was not renewed. That was not enough to establish abandonment, however, because:

[e]ven if Pennant East twice lost its liquor license, that alone does not establish that the premises were shuttered, did not move elsewhere, or did not continue operating as an alcohol-free establishment or in violation of the

licensing laws. Furthermore, even if the evidence could suggest that Pennant East closed in 2011, it is at best inconclusive as to whether Respondent discontinued use of his mark from March 2015 to March 2018.

Id. As explained below, this case is reminiscent of and analogous to *TV Azteca*.

II. The Parties and Their Marks

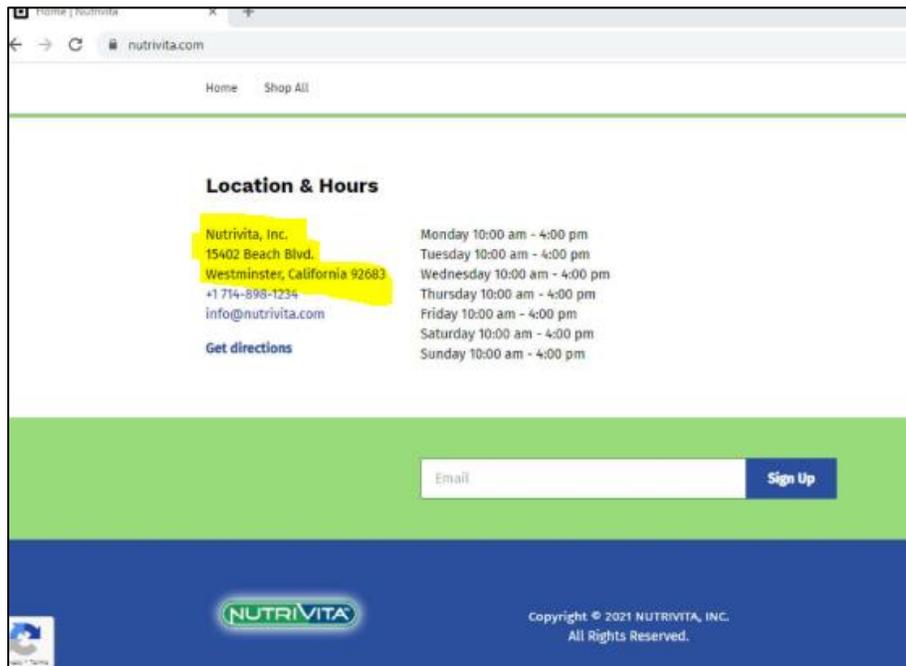
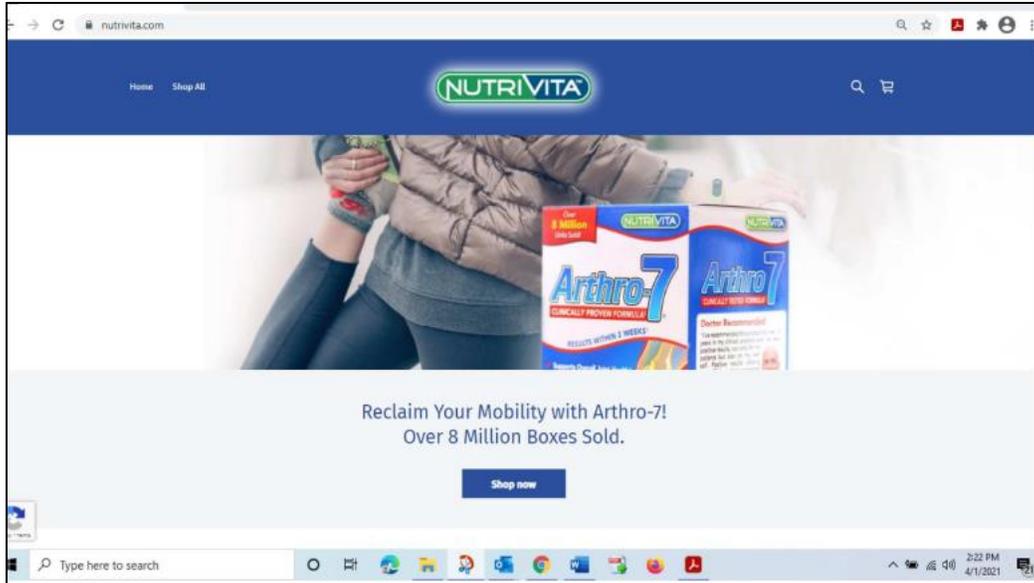
Petitioner did not introduce any evidence about itself. However, Respondent admits that Petitioner filed its pleaded application and that the application was refused based on a likelihood of confusion with the mark in the involved Registration. 17 TTABVUE 15.

Respondent, an individual, first registered the term NUTRIVITA for dietary and nutritional supplements with a design in 2011 (, Registration No. 3932441). 14 TTABVUE 28. That registration was cancelled in 2017 because Respondent failed to submit a declaration of continued use. *Id.* Less than one month after the NUTRIVITA & Design registration was cancelled, Respondent filed the NUTRIVITA standard character application that matured into the involved Registration, based on this substitute specimen:



Id. at 26. Neither of Respondent’s NUTRIVITA registrations was ever assigned. *Id.* at 40, 42, 45, 156 (USPTO assignment records and Respondent’s responses to Interrogatory No. 3 and Document Request No. 4).

Petitioner introduced Respondent’s interrogatory responses stating that: (1) Respondent first used NUTRIVITA for dietary and nutritional supplements in 2010; (2) since that time Respondent has spent “[t]housands of dollars per year” on “advertising for Respondent’s Mark in the United States;” (3) sales of products offered under the NUTRIVITA mark are “[o]ver two hundred thousand a year” since 2010; and (4) goods bearing the NUTRIVITA mark may be purchased online at “nutrivita.com” or at a retail store located at 15402 Beach Boulevard, Westminster, California. *Id.* at 46, 47 (Respondent’s responses to Interrogatory Nos. 6, 8-10). Petitioner also introduced “screenshots of [the] Nutrivita.com home page” for the purpose of showing “lack of use of the NUTRIVITA trademark” by Respondent, as depicted below:



Id. at 5, 56-58 (highlighting added).

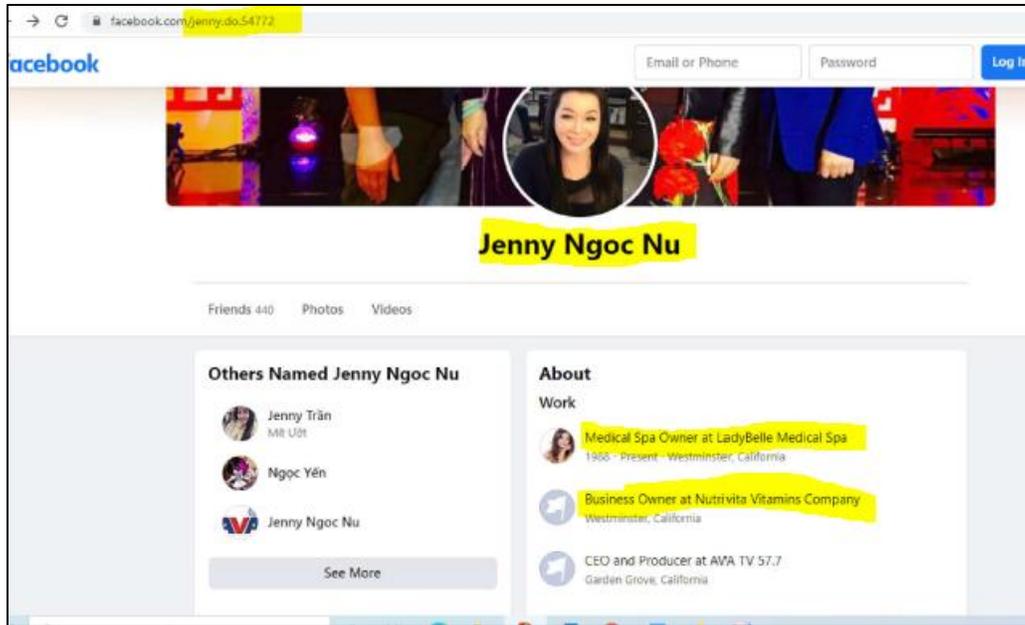
Petitioner introduced a “Business Search” of a California Secretary of State website showing that three separate California entities have corporate names including the term “Nutrivita”:

Entity Number	Registration Date	Status	Entity Name	Jurisdiction	Agent for Service of Process
C3140295	02/27/2009	ACTIVE	<u>NUTRIVITA LABORATORIES, INC.</u>	CALIFORNIA	TUONG NGUYEN
C3292938	04/01/2010	DISSOLVED	<u>NUTRIVITA, INC.</u>	CALIFORNIA	SULIMAN JAHANGIRI
C3829435	09/30/2015	FTB SUSPENDED	<u>NUTRIVITA, INC.</u>	CALIFORNIA	JENNY DO

Id. at 52 (highlighting added). One of the three entities, Nutrivita, Inc., entity number C3829435 (“Nutrivita I”), appears to be affiliated with Respondent, who is listed as its “agent for service of process.” The search also revealed another “Nutrivita, Inc.,” entity number C329938 (“Nutrivita II”), as well as “Nutrivita Laboratories, Inc.” While Nutrivita Laboratories, Inc.’s status is listed as “active,” Nutrivita I’s status is listed as “FTB Suspended”⁶ and Nutrivita II’s status is listed as “Dissolved.” Nutrivita Laboratories, Inc.’s agent for service of process, as well as its Chief Executive Officer, is Tuong Nguyen. *Id.* at 52, 142.

Petitioner also relies on what it refers to as a Facebook page “for Jenny Do/Jenny Ngoc Nu” that lists Respondent/Jenny Ngoc Nu as “Medical Spa Owner at LadyBelle Medical Spa” and “Business Owner at Nutrivita Vitamins Company.” While the page’s title is “Jenny Ngoc Nu,” the page’s url is “facebook.com/jenny.do.54772,” suggesting that Jenny Do (Respondent) and Jenny Ngoc Nu may be the same person:

⁶ While it was apparently still “FTB Suspended,” Nutrivita I continued to file documents with the California Secretary of State. 14 TTABVUE 53, 127, 131.



Id. at 9, 147 (highlighting added). Petitioner also introduced Google search results indicating that Ladybelle Medical Spa and USA Vitamin Factory are both located at 15402 Beach Boulevard, Westminster, California. *Id.* at 113-114, 118-125. As indicated, that is also the address provided in Respondent’s interrogatory responses for the retail store selling Respondent’s NUTRIVITA products. *Id.* at 47 (Respondent’s response to Interrogatory No. 10). *See also* 15 TTABVUE 12.

For her part, Respondent introduced the 1996 articles of incorporation for Lady Belle Inc. which list Nu Ngoc Do⁷ as the corporation’s “initial agen[t] for service of process,” and “Incorporator,” and indicate that Nu Ngoc Do executed the Articles of Incorporation. 15 TTABVUE 14-15. Fourteen years later, in 2010, “Ladybelle Inc.”⁸

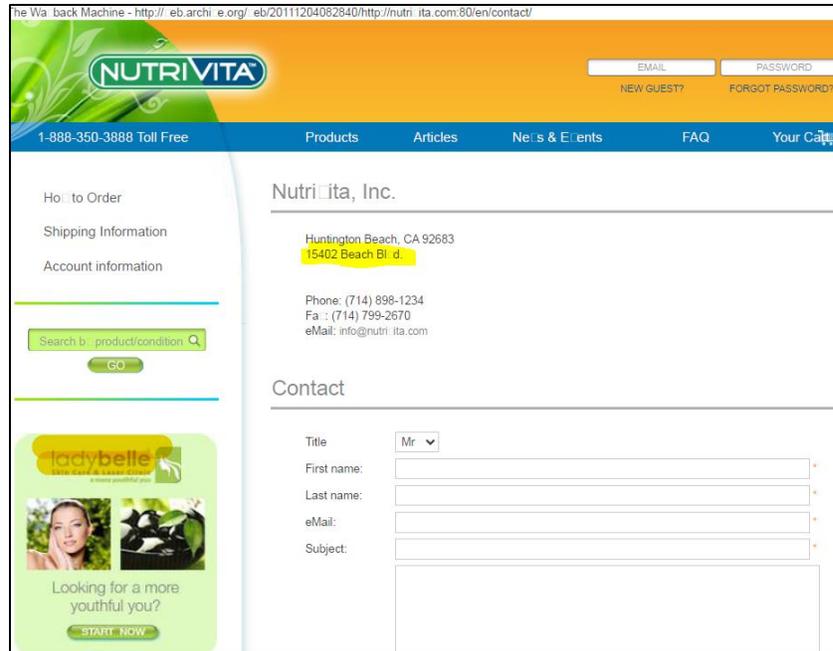
⁷ While there is no way for us to know for certain whether Nu Ngoc Do is Respondent or Jenny Ngoc Nu, the similarities between the names are apparent.

⁸ While there is no definitive evidence that “Ladybelle Inc.” is the same entity as Lady Belle Inc., they apparently have the same address – 15402 Beach Boulevard, Westminster, California.

filed a “Fictitious Business Name Statement,” signed by Respondent Jenny Do, indicating that Ladybelle’s fictitious business name is “Nutrivita.” *Id.* at 12. Six years after that, in 2016, Respondent Jenny Do was listed as the company’s Chief Executive Officer in the Statement of Information filed with California’s Secretary of State. *Id.* at 17. *See also id.* at 19 (Lady Belle’s 2021 Statement of Information, executed by Respondent Jenny Do).

Nutrivita I’s 2018 Statement of Information filed with California’s Secretary of State identified Respondent Jenny Do as its Chief Executive Officer, and indicated that the company’s address was 15402 Beach Boulevard, Westminster, California, the same address that Petitioner found for Lady Belle and USA Vitamin Factory, and that Respondent identified in her interrogatory responses as the address for the store selling NUTRIVITA products. *Id.* at 21; 14 TTABVUE 113-114, 118-125. Respondent Jenny Do also executed Nutrivita I’s 2020 Statement of Information filed with California’s Secretary of State. 15 TTABVUE 23.

Respondent introduced evidence from the Internet Archive’s Wayback Machine which it claims shows use of the NUTRIVITA mark on the “nutrivita.com” website between 2009 and 2021. *Id.* at 27-60. Some of the Wayback Machine printouts include ads for Lady Belle Skin Care and Laser Clinic on the “nutrivita.com” website, as shown below:



Id. at 31. Like Petitioner, Respondent introduced evidence that LadyBelle Medical Spa, USA Vitamin Store, “Nutrivita Vitamin & Supplements Store,” “Nutrivita, Inc.” and “Nutrivita.com”⁹ are all located at 15402 Beach Boulevard, Westminster, California. *Id.* at 62-66, 72-73. Respondent also introduced a Google Maps photograph of that location which shows a storefront with “Lady Belle Medical Spa,” “Nutrivita” and “Vitamins” signage:

⁹ While a domain name does not have a physical address, we presume that the Google search results equate the website accessible at “nutrivita.com” with Nutrivita, Inc. or Nutrivita Vitamin & Supplements Store.



Id. at 68. Finally, Respondent relies on a photograph which appears to show products bearing the NUTRIVITA mark offered for sale on television, with chyrons reading “www.nutrivita.com” and “15402 Beach Blvd., Westminster, CA”:



Id. at 75. The photo is labeled Avatv. Jenny Ngoc Nu’s Facebook page identifies her as “CEO and Producer at AVA TV 57.7.” 14 TTABVUE 147.

III. Entitlement to a Statutory Cause of Action¹⁰

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may petition to cancel the registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that is proximately caused by continued registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

Here, the refusal to register the mark in Petitioner’s pleaded application based on the involved Registration establishes Petitioner’s entitlement to a statutory cause of

¹⁰ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001 at *10 n.39 (TTAB 2021) (citing *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388 at *2 (TTAB 2020)).

action. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 USPQ 185, 189 (CCPA 1982) (“Thus, to have standing in this case, it would be sufficient that [plaintiff] prove that it filed an application and that a rejection was made because of [defendant’s] registration.”); *Tri-Star Mktg., LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d 1912, 1914 (TTAB 2007) (“petitioner has standing to bring the petition for cancellation based on the fact that its application to register [its mark] was refused registration by the office under Section 2(d) based on a likelihood of confusion with respondent’s previously registered mark”).

IV. Nonuse and Abandonment

As alluded to earlier, given Petitioner’s claims (nonuse and abandonment), the nature of the record the parties made in this case (notice of reliance evidence only) is outcome determinative. That is, because we cannot rely on any of the evidence of record for its truth, Petitioner cannot meet its burden of proving nonuse on Applicant’s filing date, or abandonment thereafter.

A. Petitioner’s Burden of Proof

Turning first to Petitioner’s nonuse claim, under 15 U.S.C. § 1051(a), the owner of a use-based application must be using the mark on the application’s filing date. *ShutEmDownSports, Inc. v. Lacy*, 102 USPQ2d 1036, 1045 (TTAB 2012); *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, 78 USPQ2d 1696, 1698 (TTAB 2006) (“It is clear that an applicant cannot obtain a registration under Section 1 of the Trademark Act for goods or services upon which it has not used the mark.”). “Use” of a mark “means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” 15 U.S.C. § 1127. Petitioner bears the

burden of proving nonuse on Respondent's filing date by a preponderance of the evidence. *See Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *U.S. Shoe Corp. v. J. Riggs West, Inc.*, 221 USPQ 1020, 1022 (TTAB 1984) ("The burden, after all, was upon opposer as party plaintiff to establish non-use in commerce by a clear preponderance of the evidence.").

As for Petitioner's abandonment claim, under Section 45 of the Act, 15 U.S.C. § 1127, a mark is considered abandoned when "its use has been discontinued with intent not to resume such use," and "[n]onuse for 3 consecutive years shall be prima facie evidence of abandonment." Because registrations are presumed valid, a party seeking to cancel a registration on the ground of abandonment bears the burden of proof to establish its case by a preponderance of the evidence. *See On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1476 (Fed. Cir. 2000) and *Cerveceria Centroamericana*, 13 USPQ2d at 1309.¹¹ If Petitioner makes a prima facie case of abandonment, the burden of production, i.e., of going forward, then shifts to Respondent to rebut the prima facie showing with evidence. *Id.* However, "[t]he burden of persuasion remains with the plaintiff to prove abandonment by a preponderance of the evidence." *ShutEmDown Sports*, 102 USPQ2d at 1042.

Thus, the bottom line for Petitioner is that "in a cancellation as opposed to an opposition proceeding, the registrant benefits from a presumption of validity ... we

¹¹ Petitioner does not dispute this. 16 TTABVUE 21 ("the burden is on the Petitioner to prove abandonment by a preponderance of the evidence ...").

conclude that, as any cancellation petitioner, [Petitioner] bears a burden of proof by a preponderance of the evidence.” *Cerveceria Centroamericana*, 13 USPQ2d at 1310.

B. Petitioner Has Not Met Its Burden

The Federal Circuit has stated that “when a party must prove a negative, as in proving abandonment through nonuse, without resort to proper inferences the burdened party could be faced with an insurmountable task.” *Cerveceria Centroamericana*, 13 USPQ2d at 1310. At the same time, however, {w]henver an inference is based on pure speculation and ‘there is no basis to *infer* nonuse,” a prima facie case of abandonment must fail.” *Id.* Here, the record does not support the inferences Petitioner asks us to draw.

Petitioner first asks us to infer that Respondent was not using its mark because: (1) Nguyen Tuong of Nutravita Laboratories at one time owned application Serial No. 90197911 for the mark NUTRIVITA LABS; (2) the “figurative elements” in the display of that mark on Mr. Tuong’s specimen of use “appear to be identical to the figurative elements” accompanying Respondent’s involved mark in Respondent’s specimen of use for the involved Registration; (3) Respondent’s uninvolved Registration No. 3932441 for NUTRIVITA & Design was cancelled; and (4) neither Mr. Tuong’s application, nor Respondent’s cancelled or involved registrations, were ever assigned. 16 TTABVUE 11, 18.

We cannot infer nonuse from this evidence, as of Respondent’s filing date, or at any other time; for this reason, we cannot infer abandonment either. First, Mr. Tuong’s application itself, as opposed to an issued registration, has “no probative value other than as evidence that the application was filed.” *Edwards Lifesciences*

Corp. v. VigiLanz Corp., 94 USPQ2d 1399, 1403 n.4 (TTAB 2010) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002)).¹² Second, the record does not reveal whether there is a licensing, successor-in-interest, or other type of relationship between Nguyen Tuong or Nutrivita Laboratories and Respondent. Third, Respondent's cancelled registration is not at issue here. In fact, it is irrelevant, especially in light of Respondent's successful application to register her broader, standard character NUTRIVITA mark less than one month after her earlier registration was cancelled. In short, while Petitioner views this evidence as "smoke," we find no "fire."

Petitioner next asks us to infer that Respondent was not using her mark because: (1) the "nutrivita.com" website (which on its face offers NUTRIVITA-branded dietary and nutritional supplements) appears to be owned by Nutrivita I, not Respondent; (2) "[a] search for the name 'Jenny' on the Nutrivita.com website showed no results"; and (3) the results of a Google search for "15402 Beach Boulevard, Westminster, California" included references to "'Ladybelle Medical Spa' and 'USA Vitamin Factory, Inc.'" but did not include any reference to Respondent." 16 TTABVUE 12, 16-17. These alleged facts neither directly establish nonuse, nor allow us to infer it. As explained above, we may not rely on any of this evidence for the truth of the matters asserted therein. And, even if we could, the evidence does not establish that there is no relationship between Respondent and Nutrivita I, Ladybelle Medical Spa, USA

¹² In any event, Nguyen Tuong expressly abandoned the application in 2021, after the involved Registration issued. 15 TTABVUE 25.

Vitamin Factory, Inc., “nutrivita.com” or 15402 Beach Boulevard, Westminster, California. Website and address searches do not always reveal everyone associated with the website or address. The evidence also does not reveal whether any use by Nutrivita I, Ladybelle or USA Vitamin Factory inured to Respondent’s benefit, or whether Respondent was selling NUTRIVITA supplements elsewhere or by other means.¹³

Petitioner could have explored these possibilities by questioning Respondent during discovery, but apparently chose to forego the opportunity. Alternatively, Petitioner could have introduced third-party testimony supporting the inferences it asks us to draw, and we could have considered that testimony for its truth. Ironically, Petitioner’s Trial Brief makes exactly this point in discussing Respondent’s strategy and evidence in this case:

Inexplicably, Respondent has not offered any witness testimony evidence to support its position that Respondent’s Mark was in use by Respondent and/or is in use by Respondent and/or that there has been a gap in use, but there is an intent to resume use by Respondent.

In the instant case, there is no testimony of even a single witness – credible or not – to establish or support use of Respondent’s Mark by Respondent, never mind documentary evidence to bolster such testimony.

¹³ If we could rely on the evidence for its truth, it would be consistent with there being some type of relationship between Respondent Jenny Do and Nutrivita I, Ladybelle, USA Vitamin Factory, “nutrivita.com” and 15402 Beach Boulevard, Westminster, California. Indeed: (1) the California “Business Search” and filings with California’s Secretary of State associate Respondent Jenny Do with Nutrivita I and Ladybelle; (2) Internet searches reveal that all of the entities and the website use the Westminster address; and (3) Respondent’s alter ego appears to be Jenny Ngoc Nu, Ladybelle’s Incorporator, whose Facebook page associates her with Ladybelle, Nutrivita Vitamins Company and television sales of NUTRIVITA products.

Therefore, the record clearly establishes a lack of use of the NUTRIVITA Mark by Respondent.

16 TTABVUE 14, 19. The essential problem for Petitioner is that Respondent does not bear the burden of proving anything. Rather, Petitioner bears the burden of proving nonuse on Respondent's filing date or abandonment. *See generally Dura Corp. v. Mead Specialties Co., Inc.*, 152 USPQ 513, 515 (TTAB 1966) ("Certainly, an applicant is under no obligation to take testimony if he is of the opinion that an opposer has not made out a case for the relief sought. That is a matter solely within applicant's discretion") (in context of opposition based on likelihood of confusion).

Finally, Petitioner points out that: (1) Nutrivita I's corporate status was "FTB Suspended"; (2) Respondent is not identified in Nutrivita I's articles of incorporation; (3) Nutrivita Laboratories corporate status was "Active"; and (4) Nguyen Tuong is Nutrivita Laboratories Inc.'s Chief Executive Officer and there is no indication that Respondent has any relationship with Nutrivita Laboratories. 16 TTABVUE 12-13. These facts alone, even if established by evidence upon which we could rely for the truth of the matters asserted, would not assist Petitioner. Indeed, even if Nutrivita I or another corporation was "suspended," we cannot presume that would prevent the entity's use of a mark, or that its use would not inure to another's benefit. *See e.g. Stock Pot Rest., Inc. v. Stockpot, Inc.*, 737 F.2d 1576, 222 USPQ 665, 668 (Fed. Cir. 1984); *Brewski Beer Co. v. Brewski Bros. Inc.* 47 USPQ2d 1281, 1286 (TTAB 1998); *WMA Grp. Inc. v. West. Int'l Media Corp.*, 29 USPQ2d 1478, 1479-80 (TTAB 1993); *Cahill v. San Diego Gas & Elec. Co.*, 194 Cal. App. 4th 939, 950-51 (2011). Furthermore, as indicated earlier, we do not know whether Respondent has any

relationship to Nguyen Tuong (who expressly abandoned his NUTRIVITA application) or Nutrivita Laboratories. Of course, we also have no evidence that Nguyen Tuong or Nutrivita Laboratories are even using NUTRIVITA as a mark. Again, Petitioner could have “filled in” some of these “blanks” through discovery or third-party testimony, but did not. In the final analysis, whether a deposition of Respondent or other competent substantive evidence might have enabled Petitioner to fill in those blanks “is not a subject on which we can, should or do speculate. Rather, we must take the record as [Petitioner] made it.” *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1884 (Fed. Cir. 1996). The record as Petitioner made it is insufficient to carry its burden of proof on either of its claims.

V. Conclusion

Petitioner has not met its burden of proving nonuse or abandonment because it has not established nonuse or an intent not to resume use. More specifically, the evidence of record does not support the inferences Petitioner asks us to draw. *See Cervectoria Centroamericana*, 13 USPQ2d at 1310 (“The protection due the registrant is provided by requiring that the inference have an adequate foundation in proven fact. Whenever an inference is based on pure speculation and ‘there is no basis ... to infer nonuse,’ a prima facie case of abandonment must fail.”) (citations omitted).

Decision: The petition for cancellation is denied.